

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN FLYNN III,

Plaintiff,

v.

DR. KHURSHID *et al.*,

Defendants.

Case No. C05-5489RBL

REPORT AND  
RECOMMENDATION:

**NOTED FOR:  
NOVEMBER 11<sup>th</sup>, 2005**

This Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). Before the court is plaintiff's motion to dismiss. (Dkt. # 7). Plaintiff indicates he wishes to dismiss this action without costs and if that is not possible to dismiss Dr. Khurshid and proceed only against persons named as John Does. (Dkt. # 7). Plaintiff specifically cites Fed. R. Civ. P 41 (a)(1) as the authority for his motion.

DISCUSSION

Fed.R.Civ.P. 41(a)(1) gives a plaintiff the right to dismiss an action prior to an answer or summary judgment being filed. The plaintiff may simply file a notice of dismissal. Plaintiff would still have to pay the filing fee. The Prison Litigation Reform Act does not provide for waiver of a

1 filing fee. When a person is granted *in forma pauperis* status they incur the filing fee as a debt.

2 Plaintiff brings his motion in the alternative, asking for dismissal and waiver of the fee or  
3 that he be allowed to dismiss Dr. Khurshid and proceed against the two persons he names as John  
4 Does Denison and Gordon. (Dkt. # 7). Fed. R. Civ. P 41 (a)(1) does not allow for this type of  
5 pleading, however, Fed. R. Civ. P. 41 (a)(2) allows the court to dismiss on terms the court deems  
6 proper.

7 The court considers plaintiff's motion as a request to dismiss under Fed. R. Civ. P 41 (a)(2).  
8 Dr. Khurshid should be dismissed and this action should proceed against the remaining two named  
9 defendants. Plaintiff must pay the filing fee.

10 CONCLUSION

11 The court should consider plaintiff's motion as a motion and not as notice of dismissal. Dr.  
12 Khurshid should be **DISMISSED WITHOUT PREJUDICE** from this action and the action should  
13 proceed against John Does Denison and Gordon. Plaintiff must still pay the filing fee. A proposed  
14 order accompanies this Report and Recommendation.

15 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
16 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.  
17 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
18 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule  
19 72(b), the clerk is directed to set the matter for consideration on **November 11<sup>th</sup>, 2005**.

20  
21 DATED this 19<sup>th</sup> day of October, 2005.

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25 Karen L. Strombom  
26 United States Magistrate Judge  
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